SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1795

PETER P. MASCAVAGE, JR.,

Petitioner,

—v.—

JAMES R. SCHLESINGER, *et al.*,

Respondents.

No. .....

DEBORAH M. RAINVILLE,

Petitioner,

—v.—

CAPT. H. B. LEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statement of the Cases 3

Reasons for Granting the Writ 6

I. The facts of this case, and the decision below, present numerous conflicts, both among the lower federal courts, and between the federal courts and the military courts, which can only be resolved by this Court 7

a. The decision of the court below is in conflict with numerous other federal court decisions 7

b. The civilian federal courts and the United States Court of Military Appeals are in conflict 8

II. The decision below is plainly erroneous under earlier decisions of this Court 11

a. By their unsuccessful application to the trial judges and to the Court of Military Appeals, the petitioners have exhausted all effective military remedies 11

b. Exhaustion of military remedies is not required where the fundamental question is military jurisdiction 12

PAGE

c. Exhaustion of military remedies is not required where the purported military remedy is plainly futile 13

d. The purpose of requiring exhaustion of remedies would not be served in these cases 14

III. These cases are not moot 17

CONCLUSION 19

APPENDIX:

Decision of Court of Appeals ..... A 1

Decision of District Court (Mascavage) ..... A 3

Decision of District Court (Rainville) ..... A 6

Decision of United States Court of Military Appeals (Mascavage) ..... A 7

Decision of United States Court of Military Appeals (Rainville) ..... A 8

TABLE OF AUTHORITIES

Cases:

Avrech v. Secretary of the Navy, 477 F.2d 1237 (D.C. Cir. 1973) 4, 17

Bullard Co. v. NLRB, 253 F. Supp. 391 (D.D.C. 1966) 15

Carafas v. LaVallee, 391 U.S. 234 (1968) 18

Chastain v. Slay, 365 F. Supp. 522 (D. Colo. 1973) 8

Cole v. Laird, 468 F.2d 829 (5th Cir. 1972) 7, 8, 9

PAGE

Councilman v. Laird, 481 F.2d 613 (10th Cir. 1973), cert. granted *sub nom.* Schlesinger v. Councilman, —— U.S. ——, 42 U.S.L.W. 3362, No. 73-662 (1973) 7, 9, 10

County of Dakota v. Glidden, 113 U.S. 222 (1885) 18

Dooley v. Ploger, —— F.2d —— (4th Cir. 1974) 11

Ginsberg v. New York, 390 U.S. 629 (1968) 18

Glover v. United States, 286 F.2d 84 (8th Cir. 1961) 15

Guagliardo v. McElroy, 259 F.2d 927 (D.C. Cir. 1958), aff'd 361 U.S. 281 (1960) 14

Gusik v. Schilder, 340 U.S. 128 (1950) 13

Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968) 15

Holder v. Richardson, 364 F. Supp. 1207 (D.D.C. 1973) 8

Leedom v. Kyne, 358 U.S. 185 (1958) 14

Levy v. Parker, 478 F.2d 772 (3d Cir. 1973) 4, 17

Levy v. Resor, 17 USCMA 135, 37 CMR 399 (1967) 12

Lichter v. United States, 334 U.S. 742 (1948) 14

Little v. Bowers, 134 U.S. 547 (1890) 18

Lyle v. Kincaid, 352 F. Supp. 81 (M.D. Fla. 1972) 8

Mascavage v. Lee, Misc. No. 73-23 (COMA May 16, 1973) 9, 12, 13

McCahill v. Eason, 361 F. Supp. 558 (N.D. Fla. 1973) 8, 17

McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963) 14

McElroy v. Guagliardo, 361 U.S. 281 (1960) 13

McKart v. United States, 395 U.S. 185 (1969) 15

Mills v. Green, 159 U.S. 651 (1895) 18

Moylan v. Laird, 305 F. Supp. 551 (D.R.I. 1969) 7

PAGE

Noyd v. Bond, 395 U.S. 683 (1969) 11, 12, 13

O'Callahan v. Parker, 395 U.S. 258 (1969) 2, 3, 4, 5, 8, 9, 10, 13, 16

Parisi v. Davidson, 405 U.S. 34 (1972) 15
Porter v. Lee, 328 U.S. 246 (1946) 17

Rainville v. Lee, 22 USCMA 464, 47 CMR 554 (1973) 5, 9, 12, 13
Redmond v. Warner, 355 F. Supp. 812 (D. Haw. 1973) 8
Reid v. Covert, 354 U.S. 1 (1957) 13
Relford v. Commandant, 401 U.S. 355 (1971) 2, 3, 8, 10, 13

Schroth v. Warner, 353 F. Supp. 1032 (D. Haw. 1973) 8
Sedivy v. Richardson, 485 F.2d 1115 (3d Cir. 1973) 11, 15

Texas & N.O. R. Co. v. North Side Belt R. Co., 276 U.S. 475 (1928) 17
Toth v. Quarles, 350 U.S. 11 (1955) 13

United States v. Adams, 19 USCMA 75, 41 CMR 75 (1969) 9
United States v. Beeker, 18 USCMA 563, 40 CMR 275 (1969) 9, 13
United States v. Fargnoli, 458 F.2d 1237 (1st Cir. 1972) 15
United States v. Rose, 19 USCMA 3, 4 CMR 3 (1969) 9, 13
United States v. Watson, 6 Crim. L. Reptr. 2377, 3 SSLR 3985 (Seventh Judicial Circuit, Fourth Judicial Area, Ft. Bliss, Tex. 1970) 14, 15

Wishmeyer v. Bolton, 361 F. Supp. 629 (N.D. Fla. 1973) 8

PAGE

Wolff v. Selective Service Local Board No. 16, 372 F.2d 817 (2d Cir. 1967) 15

Statutes:

10 U.S.C. §839(a), UCMJ Art. 39(a) 4, 5
10 U.S.C. §892, UCMJ Art. 92 ..... 4, 5
10 U.S.C. §934, UCMJ Art. 134 ..... 4, 16, 17
28 U.S.C. §1254(1) 2

Other Authorities:

Moyer, JUSTICE AND THE MILITARY (1972) 14, 16
Stern & Gressman, SUPREME COURT PRACTICE (1969) 18

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Peter P. Mascavage, Jr., and Deborah M. Rainville, petitioners herein, respectfully petition this Court for a writ of certiorari to review the judgments of the United States Court of Appeals for the District of Columbia in their respective cases, which were consolidated by the court below for all purposes, and decided upon a single opinion.

Opinions Below

The opinion of the Court of Appeals (App. A, *infra*, pp. A1-A2) is unreported. The opinions of the District Court in *Mascavage* v. *Schlesinger* (App. B, *infra*, pp. A3-A5) and in *Rainville* v. *Lee* (App. C, *infra*, p. A6) are likewise unreported. Related decisions of the United States Court of Military Appeals in *Mascavage* v. *Lee*, Misc. No. 73-23 (May 16, 1973) (unreported) and in *Rainville* v. *Lee*, 22 USCMA 464, 47 CMR 554 (1973), are annexed hereto as App. D, p. A7, and App. E, pp. A8-A10, respectively.

Jurisdiction

The judgment of the Court of Appeals in both cases was entered on March 1, 1974. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Whether the doctrine of exhaustion of military remedies deprives a federal district court of jurisdiction, prior to a court martial, to enjoin the military from trying a service person for the alleged commission of a crime which is not "service-connected" under this Court's decisions in *O'Callahan* v. *Parker*, 395 U.S. 258 (1969) and *Relford* v. *Commandant*, 401 U.S. 355 (1971)?

2. Whether the doctrine of exhaustion of military remedies has been complied with in a case where the petitioners unsuccessfully sought relief both from the military judge at the trial court level, and from the Court of Military Appeals, before instituting their Federal court proceedings?

3. Whether possession and use of marijuana, by an enlisted service member who is out of uniform, off duty, in a private civilian apartment and other off-post, non-military locations, and sale of marijuana, under such conditions, to another enlisted service member who is also out of uniform and off duty, are "service-connected" offenses under *O'Callahan* v. *Parker,* 395 U.S. 258 (1969) and *Relford* v. *Commandant,* 401 U.S. 355 (1971), so as to be within military court martial jurisdiction?

Statement of the Cases

These cases are both civil suits in which the petitioners, both enlisted persons in the United States Navy, sought injunctive relief to prevent the respondents from trying them by courts martial for offenses which were not service-connected, in violation of this Court's decisions in *O'Callahan* v. *Parker,* 395 U.S. 258 (1969), and *Relford* v. *Commandant,* 401 U.S. 355 (1971). In both cases, prior to instituting their Federal court actions, petitioners sought, unsuccessfully, to exhaust all effective military remedies available, both on the trial court level and from the Court of Military Appeals.

Mascavage

At various times from June through December, 1972, Storekeeper Third Class Peter P. Mascavage allegedly possessed and used marijuana, and sold marijuana to Photographer's Mate Airman Karen L. Cochran; the alleged offenses occurred in a private, civilian apartment, and in other private, off-post locations; petitioner Mascavage was not on duty; he was not in uniform nor accompanied by anyone in uniform; Photographer's Mate Cochran was like-

wise out of uniform and off duty. The Navy initially charged him, on January 26, 1973, with five specifications of violations of Article 134, Uniform Code of Military Justice, 10 U.S.C. §934 ("disorders and neglects to the prejudice of good order and discipline in the armed forces . . ."). Subsequently, on March 23, the charge was amended, no doubt in response to developments in the civilian courts,[1] to alleged violation of Article 92, UCMJ, 10 U.S.C. §892 (violation of a lawful regulation or order). Pursuant to UCMJ Article 39(a), 10 U.S.C. §839(a), petitioner sought dismissal of the charges, on the ground that the alleged offenses were not subject to court-martial jurisdiction under *O'Callahan* v. *Parker*, 395 U.S. 258 (1969). The military judge refused to dismiss the charges.

Mascavage then sought relief from the United States Court of Military Appeals, filing in that court a Petition for Writ of Prohibition. That court, by an order entered May 16, 1973, denied relief without opinion.

On March 1, 1973, petitioner Mascavage commenced the present action, filing a complaint in the United States District Court for the District of Columbia, which sought an injunction against his trial by court martial and a declaratory judgment that such trial would be unlawful. On April 25, 1973, the District Court denied petitioner's motion for a preliminary injunction and dismissed the complaint for lack of jurisdiction (App. B, *infra*, pp. A3-A5). Petitioner thereupon appealed to the United States Court of Appeals

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[1] Article 134 has been held to be unconstitutional on the ground of its vagueness by two courts of appeals, including that which would have jurisdiction over any claim for relief on such ground by Mascavage. *Levy* v. *Parker*, 478 F.2d 772 (3d Cir. 1973); *Avrech* v. *Secretary of the Navy*, 477 F.2d 1237 (D.C. Cir. March 20, 1973). Both cases are now *sub judice* before this Court. See 414 U.S. 816.

for the District of Columbia. That court consolidated petitioner's case for all purposes with the case of petitioner Rainville, and affirmed the decision of the District Court, holding in a *per curiam* opinion that the complaint must be dismissed for lack of jurisdiction. It is from the latter determination of the Court of Appeals that petitioner Mascavage seeks certiorari. Although it does not appear in the record, counsel are informed that Mascavage pled guilty on April 2, 1974, to one specification of possession and use of marijuana and the remaining charges were dismissed.

Rainville

The facts in petitioner Rainville's case are substantially similar. She is a Photographer's Mate Third Class, United States Navy. She has been charged with six violations of Article 92, UCMJ, 10 U.S.C. §892, on the basis of alleged possession and use of marijuana, and sale of marijuana to Photographer's Mate Airman Karen L. Cochran at various times between June and December, 1972. The alleged offenses, like Mascavage's, took place in a private civilian apartment and other off-post locations. The petitioner was off duty; she was not in uniform nor was she with anyone in uniform. Photographer's Mate Cochran was similarly out of uniform and off duty. Upon the bringing of the charges, she sought dismissal of the complaint, pursuant to UCMJ Article 39(a), 10 U.S.C. §839(a), on the ground that her trial by court-martial would be in violation of *O'Callahan, supra,* but the motion to dismiss was denied. She then moved for a Writ of Prohibition in the United States Court of Military Appeals, which was denied by memorandum opinion entered on September 13, 1973. *Rainville* v. *Lee,* 22 USCMA 464, 47 CMR 554 (1973). The Court of Military Appeals, implicitly holding that it would have jurisdiction to issue the writ sought, nevertheless held that

the alleged offenses were subject to court-martial jurisdiction, expressly noting and rejecting contrary holdings by a number of civilian courts (see Point I b, *infra*).

On May 8, 1973, petitioner Rainville filed in the District Court for the District of Columbia a complaint seeking injunctive and declaratory relief, together with a motion for a preliminary injunction. On June 22, 1973, the District Court dismissed the complaint upon the ground of lack of subject matter jurisdiction; petitioner then appealed to the Court of Appeals for the District of Columbia, which consolidated her case with that of Mascavage,[2] and affirmed the dismissal on March 1, 1974. It is from this determination of the Court of Appeals that petitioner seeks certiorari. Although it is not revealed in the record before this Court, counsel are informed that Rainville was convicted on March 29, 1974, of possession, use, and sale of marijuana, and was sentenced to $150 forfeiture for six months, reduction in grade to E-1, and a reprimand. On April 12, the convening authority commuted the forfeiture to a $675 fine; Rainville paid the fine and was discharged on April 15.

Reasons for Granting the Writ

It is respectfully submitted that certiorari should be granted in the present case for several reasons. The decision below is in direct conflict with a decision of another Court of Appeals and with numerous district courts; the facts of this case present conflicts between the lower federal courts, and the military courts; and the decision below is in direct conflict with earlier decisions of this Court.

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[2] In addition to the similarity of the factual and legal questions presented, the two cases are linked together by the common informer Cochran.

I.

The facts of this case, and the decision below, present numerous conflicts, both among the lower federal courts, and between the federal courts and the military courts, which can only be resolved by this Court.

a. *The decision of the court below is in conflict with numerous other federal court decisions.*

On the issue of exhaustion of military remedies, the decision of the court below is in conflict with a decision of another court of appeals, *Councilman* v. *Laird,* 481 F.2d 613 (10 Cir. 1973), *cert. granted sub nom. Schlesinger* v. *Councilman,* —— U.S. ——, 42 U.S.L.W. 3362, No. 73-662 (December 17, 1973), in which relief was granted to a serviceman in substantially the same procedural posture as the petitioners in this case. Although the *Councilman* court did not directly discuss the issue of exhaustion, it is plain that the Tenth Circuit was fully cognizant of the issue, and ruled *sub silentio,* since both the district court and the Court of Appeals in *Councilman* relied on *Moylan* v. *Laird,* 305 F. Supp. 551 (D.R.I. 1969), which discussed the exhaustion issue extensively, and ruled that it was no impediment; the Tenth Circuit also relied on *Cole* v. *Laird,* 468 F.2d 829 (5th Cir. 1972), in which a similar exhaustion issue was raised by the government, and was also held not to bar civilian court jurisdiction.

Moreover, numerous district courts have considered the issue of whether a service member in petitioners' situation, or a similar one, must exhaust all military remedies before resorting to the civilian courts for relief. Nearly every such district court has held that injunctive or similar relief

is available before a court martial is held, or at least before all military appellate remedies have been exhausted. See, e.g., *Chastain* v. *Slay*, 365 F. Supp. 522 (D. Colo. 1973); *Holder* v. *Richardson*, 364 F. Supp. 1207 (D.D.C. 1973); *Wishmeyer* v. *Bolton*, 361 F. Supp. 629 (N.D. Fla. 1973) (following conviction by court martial; no resort to military appellate process); *McCahill* v. *Eason*, 361 F. Supp. 588 (N.D. Fla. 1973) (decision based on unconstitutionality of UCMJ Article 134); *Redmond* v. *Warner*, 355 F. Supp. 812 (D. Hawaii 1973); *Schroth* v. *Warner*, 353 F. Supp. 1032 (D. Hawaii 1973); *Lyle* v. *Kincaid*, 352 F. Supp. 81 (M.D. Fla. 1972) (following conviction, no resort to military appeals); cf. *Cole* v. *Laird, supra*, holding that at the least, where the "exhaustion" suggested by the government would clearly be futile (see pp. 13-17, *infra*), no such exhaustion is required.

This issue, it is respectfully submitted, is an extremely important one, and as will be demonstrated below, its proper resolution will determine whether servicemen and servicewomen are to be deprived of an important part of the substantial rights guaranteed to them by this Court's decision in *O'Callahan* v. *Parker, supra*, and reaffirmed in *Relford* v. *Commandant, supra*.

b. *The civilian federal courts and the United States Court of Military Appeals are in conflict.*

Furthermore, although it was not necessary for the court below to reach the issue, there is involved in this case a direct conflict between the United States Court of Military Appeals, and nearly every civilian court which has considered the question of whether off-post, off-duty, out-of-uniform possession of marijuana is an offense cognizable by court-martial. In every one of the district court deci-

sions cited above, the latter question was answered in the negative, as it was in *Councilman* v. *Laird, supra,* and *Cole* v. *Laird, supra.* The Court of Military Appeals, however, has consistently held any drug possession by a service person to be a service-connected offense, no matter what the facts of the case, and has indeed specifically held that the alleged offenses of both petitioners herein are service-connected. *Rainville* v. *Lee,* 22 USCMA 464, 47 CMR 554 (1973); *Mascavage* v. *Lee,* Misc. No. 73-23 (C.O.M.A. May 16, 1973). See also, e.g., *United States* v. *Adams,* 19 USCMA 75, 41 CMR 75 (1969) (affirming conviction for off-post possession of marijuana); *United States* v. *Rose,* 19 USCMA 3, 4 CMR 3 (1969) (affirming conviction for off-post sale of barbiturates and amphetamines); *United States* v. *Beeker,* 18 USCMA 563, 40 CMR 275 (1969) (" . . . [P]ossession of marihuana by military persons is a matter of immediate and direct concern to the military as an act intimately concerned with prejudice to good order and discipline or to the discredit of the armed forces. . . . Like wrongful use, wrongful possession of marihuana and narcotics on or off base has singular military significance which carries the act outside the limitation on military jurisdiction set out in the *O'Callahan* case").

That the issue presented is an important one was recently and successfully urged to this Court by the government itself.

> "Off-post narcotics and marijuana offenses constitute one of the largest categories of off-post offenses by servicemen over which the military has exercised jurisdiction. In 1967, the Army assumed jurisdiction over 106 such offenses. [citation omitted] Because of the large number of these cases, the issue regarding

the constitutional limitations upon the military's jurisdiction to try such offenses should be promptly and authoritatively resolved." Petition for Writ of Certiorari, at 5-6, *Schlesinger* v. *Councilman, cert. granted* —— U.S. ——, 42 U.S.L.W. 3362, No. 73-662 (December 17, 1973).

It is respectfully submitted that, certiorari having been granted in *Councilman,* it should also be granted here, and the cases set down for argument together. While the underlying facts of this case and *Councilman* are similar, there are also differences of possible significance, in that Councilman is a commissioned officer, while petitioners here are not; petitioners here have exhausted their military remedies to a far greater extent than did Councilman (see Point II, *infra*); and this case presents far more clearly than *Councilman* the problem of the extent to which a serviceman must resort to military remedies before invoking the civilian courts to contest court-martial jurisdiction. Thus, consideration of both this case and *Councilman* will give this Court far greater opportunity to explore and resolve the reach of *O'Callahan* and *Relford,* and the remedies which are available to a service person who is charged in violation of the requirements of the latter cases.

II.

The decision below is plainly erroneous under earlier decisions of this Court.

a. By their unsuccessful application to the trial judges and to the Court of Military Appeals, the petitioners have exhausted all effective military remedies.

The court below rested its decision on *Dooley* v. *Ploger*, —— F.2d —— (4th Cir. 1974) and *Sedivy* v. *Richardson*, 485 F.2d 1115 (3rd Cir. 1973), petition for certiorari filed December 26, 1973. The latter two cases, however, rely in turn on portions of this Court's decision in *Noyd* v. *Bond*, 395 U.S. 683 (1969). But an examination of the rationale of *Noyd* makes clear that its exhaustion requirements are inapplicable to this case. Indeed, a correct reading of *Noyd* demonstrates incontestably the error of the decision below.

In *Noyd*, the petitioner was seeking relief under what he contended to be the proper construction of certain provisions of the Uniform Code of Military Justice, and the Manual for Courts-Martial, governing confinement after court-martial conviction and while a military appeal was pending. This Court held that Captain Noyd must first exhaust the one available military remedy, an application for interim relief to the Court of Military Appeals, because reaching the merits of his claim would require the Court "to interpret extremely technical provisions of the Uniform Code which have no analogs in civilian jurisprudence . . ." 395 U.S. at 696. Moreover, the Court observed:

> "In reviewing military decisions, we must accommodate the demands of individual rights and the social order

> in a context which is far removed from those which we encounter in the ordinary run of civilian litigation, whether state or federal. In doing so, we must interpret a legal tradition which is radically different from that which is common in civil courts." *Id.* at 694.

This Court pointed out that almost one year before Noyd had first sought relief from the civilian courts, the Court of Military Appeals had held, in *Levy* v. *Resor*, 17 USCMA 135, 37 CMR 399 (1967), that it had the power to and would, in appropriate cases, grant the very relief which Noyd sought from the federal civilian courts. *Noyd* v. *Bond, supra,* 395 U.S. at 695.

The holding in *Noyd,* however, cannot be a bar to the relief sought by petitioners here, for they have punctiliously and deliberately *complied* with the very requirement established by *Noyd.* Both petitioners have sought, and been denied, extraordinary relief in the Court of Military Appeals. *Rainville* v. *Lee,* 22 USCMA 464, 47 CMR 554 (1973); *Mascavage* v. *Lee,* Misc. No. 73-23 (C.O.M.A. May 16, 1973).

b. *Exhaustion of military remedies is not required where the fundamental question is military jurisdiction.*

In addition, unlike Captain Noyd, the petitioners here are not seeking an interpretation of some technical provision of military law. They are questioning the military's jurisdiction under the Constitution to try them in the first instance. Thus, the *Noyd* Court observed that it had decided numerous cases holding that the Constitution barred the assertion of court-martial jurisdiction over various classes of persons, without requiring those persons to exhaust such military remedies as might be available.

McElroy v. *Guagliardo*, 361 U.S. 281 (1960); *Reid* v. *Covert*, 354 U.S. 1 (1957); *Toth* v. *Quarles*, 350 U.S. 11 (1955). Compare *Gusik* v. *Schilder*, 340 U.S. 128 (1950), applying the general rule that a service person who does not contest the military's jurisdiction to try him in the first instance, must exhaust military remedies before resorting to the civilian courts. *Gusik* was clearly limited by *Guagliardo*, *Reid*, and *Toth*, and the substance of the petitioners' claims was reached in the latter cases, "because we did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented. Moreover, it appeared especially unfair to require exhaustion of military remedies when the complainants raised substantial arguments denying the right of the military to try them at all. Neither of these factors is present in the case before us." 395 U.S. at 696, fn. 8.

Both of these factors, however, are present in this case, and the court below simply ignored them completely. The very argument presented by petitioners is that, pursuant to this Court's decisions in *O'Callahan* and *Relford*, there is no jurisdiction in the military to try them for the offense alleged.

c. Exhaustion of military remedies is not required where the purported military remedy is plainly futile.

In addition, it is clear that any attempted resort to military remedies, by exhausting the military appellate process, would be completely futile, since the Court of Military Appeals has already held petitioners' alleged offenses to be cognizable by court-martial. *Rainville* v. *Lee*, *supra*; *Mascavage* v. *Lee*, *supra*; see also *United States* v. *Rose* and *United States* v. *Beeker*, both *supra*. Indeed, the futility of

the "remedy" to which the court below has consigned petitioners is made still more manifest by the final result in *United States* v. *Watson*, 6 Crim. L. Rptr. 2377, 3 SSLR 3985 (Seventh Judicial Circuit, Fourth Judicial Area, Ft. Bliss, Tex. 1970). In *Watson*, the sole case of which petitioners are aware in which a military judge held that there was no court-martial jurisdiction to try a charge of off-post possession of marijuana, the military judge was forthwith overruled by the lay convening authority, and the court-martial directed to be held. See Moyer, JUSTICE AND THE MILITARY 167 (1972).

Thus, it is plain that the court below has remitted the petitioners to a totally hopeless and ineffective "remedy."

> ". . . [T]he highest court available under the Uniform Code of Military Justice has consistently upheld jurisdiction over persons in the same legal posture as appellant. Appellant should not be required to await a similar decision in his case." *Guagliardo* v. *McElroy*, 259 F.2d 927, at 929, fn. 4 (D.C. Cir. 1958), *aff'd* 361 U.S. 281 (1960).

d. The purpose of requiring exhaustion of remedies would not be served in these cases.

While the judge-made doctrine of exhaustion may be appropriate, where other remedies indeed hold out hope of relief, the courts have consistently recognized that "when there is nothing to be gained from the exhaustion of administrative remedies and the harm from the continued existence of the administrative ruling is great, the courts have not been reluctant to disregard this doctrine. See *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963); *Leedom* v. *Kyne*, 358 U.S. 185 (1958); *Lichter* v. *United*

States, 334 U.S. 742 (1948); *Glover* v. *United States*, 286 F.2d 84 (8th Cir. 1961); *Bullard Co.* v. *N.L.R.B.*, 253 F. Supp. 391 (D.D.C. 1966)." *Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817, 825 (2d Cir. 1967) (Medina, J.). See also, e.g., *McKart* v. *United States*, 395 U.S. 185 (1969); *United States* v. *Fargnoli*, 458 F.2d 1237 (1st Cir. 1972); *Hammond* v. *Lenfest*, 398 F.2d 705 (2d Cir. 1968).[3]

The courts which have ruled contrary to petitioners' position have rested their decisions in part on the assertion —or the expectation—that a military defendant might have presented to the military courts all of the facts in support of his or her claim that the alleged offense was not service-connected, and therefore not subject to court-martial jurisdiction. See, e.g., *Sedivy* v. *Richardson*, 485 F.2d 1115, 1121 (3d Cir. 1973). However, where the Court of Military Appeals has repeatedly held that *any* possession of drugs is a service-connected offense (and see *United States* v. *Watson*, *supra*), and, as here, has specifically ruled *against these petitioners* on their applications for writs of prohibition, it is plainly questionable whether an accused would have an opportunity to present evidence on the lo-

[3] This Court reached a similar result in *Parisi* v. *Davidson*, 405 U.S. 34 (1972), where petitioner had sought habeas corpus review of the military's denial of his application for discharge as a conscientious objector. The government insisted that Parisi should be required to exhaust his military remedies, by asserting the wrongful denial of his conscientious objector claim as a defense to his pending court-martial for disobedience of orders, and by applying to the Court of Military Appeals for a writ of habeas corpus to obtain his discharge. This Court held, however, that earlier decisions of the Court of Military Appeals had rendered it at best dubious whether the court-martial defense would be recognized, while the Court of Military Appeals' statutory jurisdiction to grant the suggested habeas corpus relief was equally questionable; therefore, the *Parisi* Court held, the petitioner could not "properly be required to exhaust a remedy which may not exist." 405 U.S. at 45.

cation and other circumstances of the offense--evidence which the military courts would consider totally irrelevant. By the time the military justice system had run its course, and petitioners were able to commence a post-conviction, post-military appellate exhaustion habeas corpus proceeding, the relevant evidence might well be lost or otherwise unobtainable.

Moreover, the very protections which this Court sought to erect for service persons in *O'Callahan* v. *Parker,* 395 U.S. 258 (1969), would be seriously undermined if those in petitioners' position were required to submit to courts-martial before obtaining civilian court review of military jurisdiction. Thus, this Court's decision in *O'Callahan* plainly rested in part upon the harshness of the military justice system; there is no procedure for bail under the Uniform Code of Military Justice, and an accused is commonly imprisoned while his trial and appeals proceed, even for alleged offenses, and under conditions, which would merit release on personal recognizance in most civilian courts. See Moyer, JUSTICE AND THE MILITARY, at 407-408 (1972). If an accused must exhaust this process before having resort to the civilian courts, it is clear that he will frequently be subjected to an extended term of imprisonment, before there has even been an authoritative determination of whether the military has jurisdiction to try him at all.

Finally, the Court in *O'Callahan* recognized that the very subjection of an accused to a court-martial was irreparable harm in itself. Noting with some disfavor the vagueness of Article 134 of the UCMJ—the very article under which petitioner Mascavage was originally charged—the Court observed that "it is not enough to say that a court-martial

may be reversed on appeal. One of the benefits of a civilian trial is that the trap of Article 134 may be avoided by a declaratory judgment proceeding or otherwise." 395 U.S. at 266.[4]

III.

These cases are not moot.

The government may attempt to argue, in opposition to certiorari, that these cases are moot, since both petitioners have been convicted by courts-martial. Such an argument, however, would plainly be erroneous. This Court has repeatedly held, in an unbroken chain of authority reaching into the last century, that a defendant against whom an action for an injunction is pending, cannot moot the action by taking the very step which is sought to be enjoined. Thus, this Court held unanimously (Mr. Justice Jackson not participating):

> "It has long been established that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the status quo." *Porter* v. *Lee,* 328 U.S. 246, at 251 (1946).

See also, *Texas & N.O.R. Co.* v. *North Side Belt R. Co.,* 276 U.S. 475, at 479 (1928) (per Brandeis, J.). Cf. *Mills*

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[4] Indeed, as noted (footnote 1, *supra*), Article 134 has been held to be unconstitutional on precisely the ground of its vagueness by two circuit courts of appeals, in *Levy* v. *Parker,* 478 F.2d 772 (3d Cir. 1973) and *Avrech* v. *Secretary of the Navy,* 477 F.2d 1237 (D.C. Cir. 1973). The Court of Military Appeals, however, has specifically rejected these holdings, and prosecutions under Article 134 continue. See *McCahill* v. *Eason,* 361 F. Supp. 588 (N.D. Fla. 1973).

v. *Green*, 159 U.S. 651 (1895); *Little* v. *Bowers*, 134 U.S. 547 (1890); *County of Dakota* v. *Glidden*, 113 U.S. 222 (1885); and see Stern & Gressman, SUPREME COURT PRACTICE, Section 18.1 at pp. 588-589, n. 10 (1969).[5]

The fact that the Navy did not await outcome of this petition for certiorari, but insisted on holding the courts-martial which this action seeks to enjoin, cannot render this case moot.

[5] Neither the absence of a sentence of imprisonment nor the amount of financial loss involved in the reduction in grade, in any way renders the case moot. See *Carafas* v. *LaVallee*, 391 U.S. 234 (1968); *Ginsberg* v. *New York*, 390 U.S. 629 (1968). Regardless of the magnitude of the punishment imposed, the fact of court-martial conviction for an alleged drug offense has "collateral consequences" which plainly preclude mootness. See Stern & Gressman, *supra*, pp. 589-592.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, N. Y.
May 30, 1974

Respectfully submitted,

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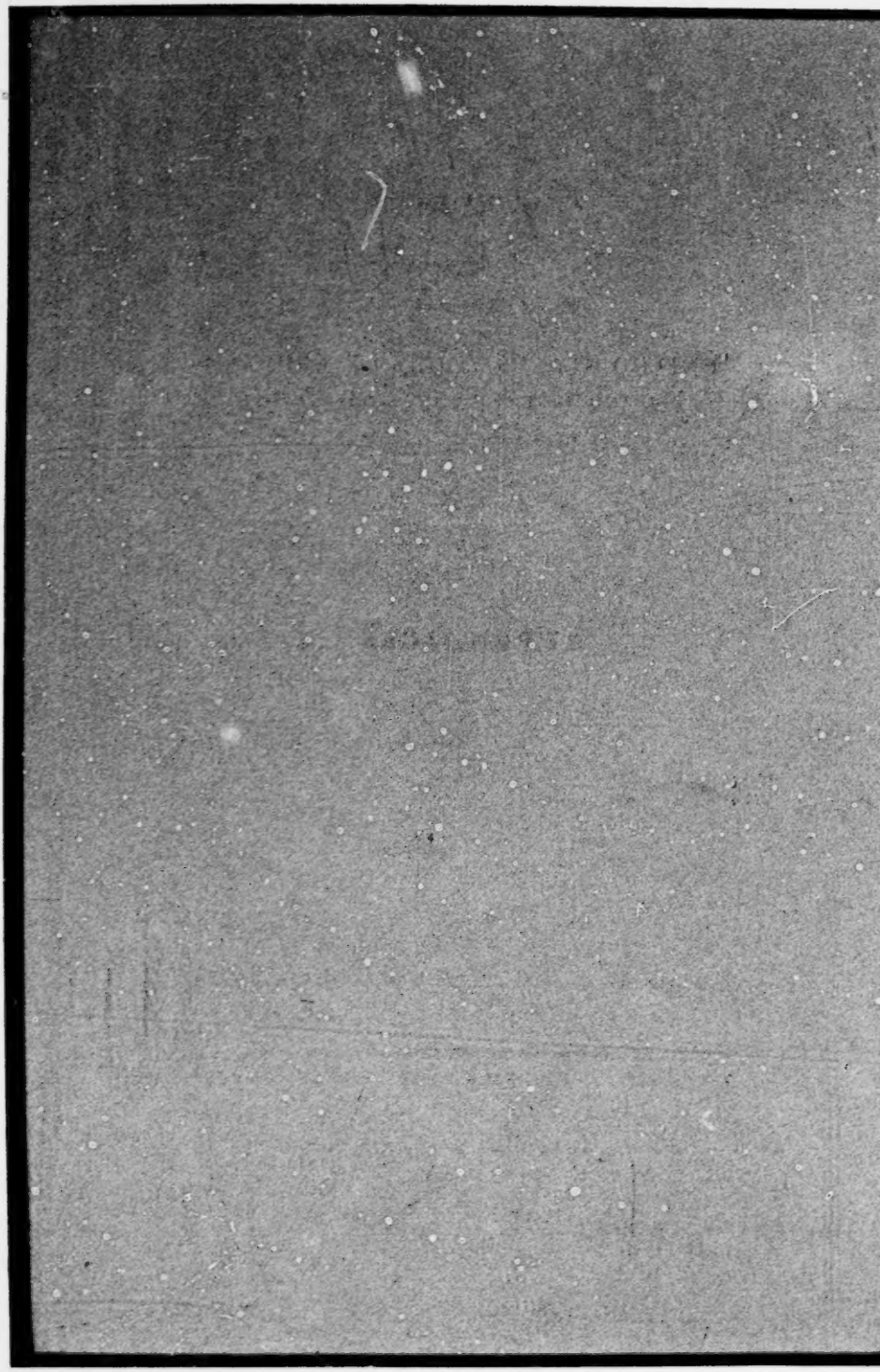
APPENDICES



APPENDIX A

Judgment

[Filed March 1, 1974]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1446—SEPTEMBER TERM, 1973

Civil 402-73

PETER P. MASCAVAGE, JR.,

Appellant,

—v.—

HONORABLE JAMES R. SCHLESINGER, *et al.*

No. 73-1739

Civil 893-73

DEBORAH M. RAINVILLE,

Appellant,

—v.—

CAPTAIN H. B. LEE, USN Commanding Officer
Naval Photographic Center.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before:

BAZELON, *Chief Judge,*
McGOWAN and MACKINNON, *Circuit Judges.*

These appeals having come on to be heard on the record and the briefs, and the court having taken the cases under submission after oral argument by the parties, it is hereby

ORDERED that the judgments of the District Court dismissing the respective complaints for lack of jurisdiction are hereby affirmed. *Sedivy* v. *Richardson,* 485 F.2d 1115 (3d Cir.), pending on petition for certiorari filed December 26, 1973, U.S. No. 73-6030; *Dooley* v. *Ploger* and *Gnip* v. *McCaughan,* (4th Cir. Nos. 73-1900 and 73-2207, decided February 12, 1974).

Per Curiam
For the Court

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

APPENDIX B

Findings of Fact, Conclusions of Law and Order

[Filed April 25, 1973]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 402–73

PETER P. MASCAVAGE,

Plaintiff,

—v.—

HONORABLE ELLIOT RICHARDSON, *et al.,*

Defendants.

This cause having come for hearing on April 13, 1973, this Court, having fully considered the relevant documents and arguments of counsel, makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The pertinent facts are that on October 20, 1972, plaintiff, Storekeeper Petty Officer Third Class (SK3) Mascavage sold marijuana to Photographer Airman (PHAN) Karen Cochran while both were off duty, off base, and out of uniform.

2. Charges were preferred against plaintiff on January 26, 1973 under Article 134 U.C.M.J. (10 U.S.C. 834). On

March 1, 1973 plaintiff's court martial was postponed indefinitely pending the outcome of the instant case. On March 23, 1973 plaintiff's charge was changed to a charge under Article 92 U.C.M.J. He has not yet been arraigned.

CONCLUSIONS OF LAW

The Court concludes that it lacks jurisdiction to entertain the instant motion for two reasons: (1) failure to exhaust administrative remedies and (2) failure to allege irreparable injury.

1. Plaintiff has not fully pursued his military remedies. *Gusik* v. *Schilder*, 340 U.S. 128 (1950); *Noyd* v. *Bond*, 395 U.S. 683, 693, 695-6 (1969); *Polsky* v. *Wetherill*, 438 F. 2d 132 (10th Cir. 1971). *Relford* v. *Commandant*, 401 U.S. 355, 365 (1971) sets forth twelve criteria which should be applied to each case to determine whether or not it is "service-connected." Among these criteria are the connection between the defendant's military duties and the crime, whether or not the victim is engaged in military duties, and whether there is a threat to a military post. Each case must be determined according to its own facts. Clearly the military is better suited than civilian courts to make these determinations as a matter of first impression, subject only to review by the District Courts. Here, no attempt has been made to present this issue to the military.

2. Plaintiff has failed to allege or prove irreparable injury. It is well settled that merely being exposed to the possibility of trial does not create a potential for injury so irreparable as to justify the extraordinary remedy of injunction. *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Douglas* v. *City of Jeanette*, 319 U.S. 157, 164 (1943); see

Polsky, supra. This is especially true of enjoining a court martial where the District Court's scope of review has traditionally been very limited. E.g. *Brotcher* v. *McNamara,* 448 F.2d 222 (10th Cir. 1972).

Accordingly, it is this 25th day of April 1973

ORDERED that plaintiff's motion for preliminary injunction be, and it is hereby, denied, and it is further

ORDERED that this case be, and it is hereby, dismissed for lack of jurisdiction.

JOHN LEWIS SMITH, JR.
United States District Judge

APPENDIX C

Opinion and Order

[Filed June 27, 1973]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 893-73

DEBORAH M. RAINVILLE,

Plaintiff,

—v.—

CAPTAIN H. B. LEE,

Defendant.

The Court concludes that it lacks jurisdiction to entertain this action due to the plaintiff's failure to exhaust military remedies.

Upon consideration of plaintiff's motion for a stay pending appeal, it is by the Court this 27th day of June, 1973,

ORDERED that the defendant and his successors are hereby enjoined from subjecting the plaintiff to trial by court-martial for the offenses that have been the subject of this litigation until or unless the Court of Appeals dissolves this stay; and it is

FURTHER ORDERED that delivery of a copy of this order to Assistant United States Attorney Michael A. Katz by counsel for the plaintiff be deemed sufficient service upon the defendant.

H. F. CORCORAN
United States District Judge

APPENDIX D

Order

[Filed May 16, 1973]

UNITED STATES COURT OF MILITARY APPEALS

Miscellaneous Docket No. 73-23

PETER P. MASCAVAGE, Storekeeper
Third Class, USN,

Petitioner,

—v.—

CAPTAIN H. B. LEE, Commander, Navy Photographic
Center, Washington, D. C. 20374,

Respondent.

On consideration of the "Petition for Writ of Prohibition and Brief in Support Thereof" filed in the above-entitled action, it is, by the Court, this 16th day of May 1973,

ORDERED:

That said Petition be, and the same is, hereby denied.

For the Court

cc: The Judge Advocate General
David F. Addlestone, Esquire
Respondent

APPENDIX E

Memorandum Opinion of the Court

UNITED STATES COURT OF MILITARY APPEALS

DEBORAH M. RAINVILLE, U. S. Navy,

Petitioner,

—v.—

H. B. LEE, Captain, U. S. Navy,

Respondent.

Miscellaneous Docket No. 73-42

On Petition for Writ of Prohibition

September 13, 1973

David F. Addlestone, Esquire, counsel for Petitioner.

By this petition for writ of prohibition, petitioner seeks to bar her trial by special court-martial on charges alleging, in 6 specifications, violations of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892, by wrongful possession, use, and sale to a fellow service member of marihuana. She avers that the alleged offenses occurred while she was off duty, off base and out-of-uniform, as was the person to whom the sale was allegedly made. Thus, it is contended, the court-martial to which the pending charges have been referred for trial is without jurisdiction. O'Callahan v. Parker, 395 U.S. 258 (1969).

In United States v. Beeker, 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969), this Court examined the effect of O'Callahan v. Parker, supra, upon the jurisdiction of courts-martial over the offenses of use and possession of marihuana committed beyond the limits of a military reservation. We there held that because of the particular significance of the effect of such offenses, wherever committed, upon the fitness for duty of persons in the armed forces and because of their manifest tendency to prejudice good order and discipline in the armed forces, courts-martial continue properly to exercise jurisdiction of such cases. See also United States v. Rose, 19 U.S.C.M.A. 3, 41 C.M.R. 3 (1969); United States v. Castro, 18 U.S.C.M.A. 598, 40 C.M.R. 310 (1969). In United States v. Morley, 20 U.S.C.M.A. 179, 43 C.M.R. 19 (1970), an off-post sale of marihuana and LSD to a civilian was held to have no such service connection as would permit the exercise of court-martial jurisdiction. And in United States v. Teasley, 22 U.S.C.M.A. 131, 46 C.M.R. 131 (1973), we indicated the offense charged must have a direct effect upon the fitness for duty, as distinguished from a mere potential for such a result.

In sum, we have frequently addressed ourselves to the problem presented in this petition, and despite contrary holdings by the Court of Appeals for the 5th Circuit, and by judges of United States District Courts, cited and relied upon by petitioner,[1] we have adhered to the position first taken in United States v. Beeker, supra. For us to do otherwise would require us to ignore the plain obligation

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[1] Cole v. Laird, 468 F. 2d 829 (5th Cir. 1972); Schroth v. Warner, 353 F. Supp. 1032 (D. Haw. 1973); Lyle v. Kincaid, 344 F. Supp. 223 (D. Fla. 1972); Moylan v. Laird, 305 F. Supp. 551 (D. R.I. 1969).

of our armed forces to maintain, by proper disciplinary sanctions, the capacity of all service personnel to function as an effective force.

In view of the foregoing, we are of the opinion that the petition sets forth no legal basis for the relief requested. Accordingly, the petition is dismissed.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1795

PETER P. MASCAVAGE, JR., PETITIONER

v.

JAMES R. SCHLESINGER, ET AL.

AND

DEBORAH M. RAINVILLE, PETITIONER

v.

CAPTAIN H. B. LEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

The principal issue in this case is whether a federal district court may enjoin a pending court-martial on the basis of the accused serviceman's contention that the court-martial has no jurisdiction under *O'Callahan* v. *Parker*, 395 U.S. 258, because the offense charged is not service connected.

STATEMENT

1. *Mascavage* v. *Schlesinger*

The Navy preferred court-martial charges against Mascavage, an enlisted man in the United States Navy, alleging that he possessed and used marijuana while off

base and sold marijuana to another enlisted person, in violation of various articles of the Uniform Code of Military Justice ("U.C.M.J."). Mascavage filed in the United States District Court for the District of Columbia a complaint seeking *habeas corpus* relief, an injunction against his trial by court-martial and a judgment declaring the trial unlawful. The complaint was accompanied by a motion for a preliminary injunction requiring his immediate release from Naval service.[1] He contended that the alleged offenses were not subject to court-martial jurisdiction under *O'Callahan* v. *Parker*, 395 U.S. 258, because they were not "service connected."

The district court dismissed the suit, ruling that it lacked jurisdiction because of failure to exhaust administrative remedies or to allege irreparable injury. As the court observed (Pet. App. B, A4), "no attempt [had] been made to present this issue [of court-martial jurisdiction] to the military."

Shortly after the dismissal, Mascavage moved the court martial to dismiss the charges. That motion was denied, and Mascavage petitioned the United States Court of Military Appeals for a writ of prohibition against further court-martial proceedings. The court denied the petition (Pet. App. D).

On March 1, 1974, the court of appeals affirmed the judgment of the district court in a *per curiam* opinion and order (Pet. App. A).

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[1] Mascavage's period of active service was originally due to expire on January 29, 1973. Because of the pending charges, he was being held in the service beyond that date at the time he sought relief in the district court. See Article 2(1), U.C.M.J., 10 U.S.C. 802(1).

The request for *habeas corpus* relief was later withdrawn. In his original complaint Mascavage sought "such other and proper relief" as the court deemed equitable. On July 23, 1973, Mascavage submitted to his commanding officer a request for release from active duty on leave without pay pending the outcome of the instant suit.

On April 2, 1974, prior to the filing of this petition for a writ of certiorari, Mascavage pleaded guilty to two specifications of possession and use of marijuana, and the remaining charges were dismissed. He was sentenced to reduction to the lowest enlisted grade and fined $500.

2. *Rainville* v. *Lee*

Deborah Rainville, also an enlisted person in the United States Navy, was charged with violations of the U.C.M.J. involving her alleged possession and use of marijuana and sale of marijuana to another enlisted person. She filed a similar suit in the district court seeking injunctive and declaratory relief and a motion for a preliminary injunction, alleging lack of military jurisdiction.[2] She also moved the court-martial to dismiss the charges for lack of jurisdiction, and the motion was denied. The district court then dismissed the complaint for injunctive and declaratory relief "due to the plaintiff's failure to exhaust military remedies" (Pet. App. C) and denied as moot the motion for a preliminary injunction.

Rainville petitioned the Court of Military Appeals for a writ of prohibition, and the court denied that petition, ruling that the alleged offenses were service-connected under *O'Callahan* (Pet. App. E).

Subsequently, the court of appeals -- which had consolidated her appeal with that of Mascavage -- affirmed the dismissal of Rainville's complaint for lack of jurisdiction (Pet. App. A).

Following a trial by court-martial, Rainville was convicted of possession, use, and sale of marijuana and was sentenced to $150 forfeiture for six months (which the convening authority commuted to a $675 fine), reduction in grade, and a reprimand.

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[2]Rainville, whose term of duty was not to expire until January 8, 1974, did not seek *habeas corpus* relief.

DISCUSSION

1. The principal issue petitioners raise is whether a district court may enjoin a pending court-martial where the jurisdiction of the court-martial is challenged on the ground that the offense is not "service connected" under *O'Callahan*. The same issue is presented in *Schlesinger* v. *Councilman*, No. 73-662, certiorari granted, 414 U.S. 1111, and a related jurisdictional issue in *McLucas* v. *DeChamplain*, No. 73-1346, question of jurisdiction postponed to hearing on the merits, June 24, 1974.

Here, as in *Councilman*, petitioners failed to exhaust their remedies within the military justice system when they sought relief in the district court. For the reasons developed in our brief on the jurisdictional issues in *Councilman* (pp. 9-19), the failure to exhaust those remedies barred the district court from interfering with the court-martial. Furthermore, for the reasons also developed in that brief and in our brief in *DeChamplain*,[3] it would be improper for the district court to enjoin a pending court-martial prosecution.

Finally, at least with respect to petitioner Rainville's case, the district court properly declined to act for the additional reason that it had no jurisdiction to review court-martial proceedings other than by writ of *habeas corpus*. Article 76 of the U.C.M.J., 10 U.S.C. 876, makes the action of courts-martial conclusive upon civilian courts except insofar as the Constitution, Article I, Section 9, requires the allowance of *habeas corpus*. See our brief on the jurisdictional issue in *Councilman* (pp. 6-8) and our supplemental brief in *Secretary of the Navy* v. *Avrech*, No. 72-1713, decided July 8, 1974.[4]

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[3]We are furnishing counsel for petitioners with these briefs and also with our supplemental brief in *Secretary of the Navy* v. *Avrech*, mentioned in the text.

[4]See note 3, *supra*.

Since the Court will have full opportunity to consider the jurisdictional issues in *Councilman* and *DeChampdini* there is no occasion for it to hear this case together with those cases. Instead, it should defer action on this petition until it has decided those cases.

2. Petitioners also contend that the offenses with which they were charged--the off-base possession, use and sale of marijuana--are not "service connected" within the meaning of *O'Callahan*, so that the court-martial had no jurisdiction to try them. A related question is presented in *Councilman*, where the off-base possession was by a commissioned officer who also sold the drug to an enlisted man. If the Court agrees with our submission in *Councilman* that the district court has no jurisdiction to enjoin a court-martial, there is no occasion to reach the substantive issue either there or here. If it disagrees with us on the jurisdictional issue, its decision on the substantive issue in *Councilman* should aid in resolving the substantive issue here, which the lower courts did not reach.

In the circumstances, we do not think it would be appropriate for this Court to consider the substantive issue here together with *Councilman*. Rather, we suggest that it should hold this case pending its decision in *Councilman*, and if it reaches the substantive issues in *Councilman*, then deal with the substantive issue here in accordance with that decision. Such disposition might be to deny certiorari, to remand to the district court to reconsider in the light of that case, or for the Court itself then to decide the issue.

CONCLUSION

The Court should hold this petition pending the decisions in *Councilman* and *DeChamplain*, and then dispose of it in accordance with those decisions.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

DOJ-1974-09